

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1042

No. 77-1042

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

-against-

ARLETHA FRANKLIN,

Defendant - Appellant.

On Appeal From the United States
District Court
For the Southern District of New York

BRIEF FOR APPELLANT ARLETHA FRANKLIN

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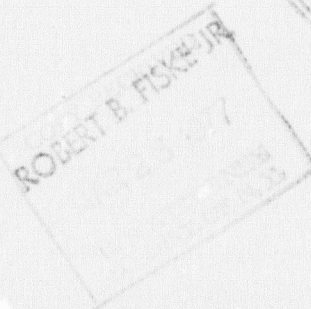
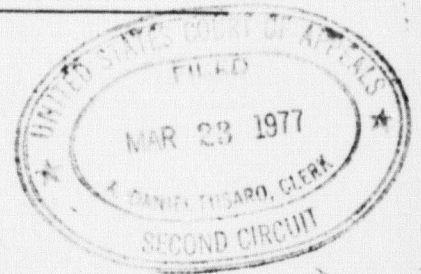


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QUESTIONS PRESENTED

1. DID THE TRIAL COURT ERR IN NOT DISMISSING THE INDICTMENT BECAUSE OF A VARIANCE BETWEEN THE PROOF AND THE INDICTMENT? THE GOVERNMENT CLAIMED A SINGLE CONSPIRACY. MULTIPLE CONSPIRACIES WERE SHOWN
2. DID THE TRIAL COURT ERR IN ALLOWING THE GRAND JURY TESTIMONY OF SAMPSOM WILLIAMS AS AFFIRMATIVE PROOF?
3. DID THE TRIAL COURT ERR IN FAILING TO INSTRUCT THE JURY ON THE DIFFERENCE BETWEEN A SINGLE CONSPIRACY AND A MULTIPLE CONSPIRACY?

STATEMENT PURSUANT TO RULE 28 (3)

Preliminary Statement

Appellant, ARLETHA FRANKLIN, appeals from a judgment of conviction, from the United States District Court, Southern District of New York (Connor, J.) convicting her of conspiracy to sell and distribute narcotics and of two substantive charges of distributing narcotics in violation of 21 USC 812 and 841.

Appellant, was sentenced to five years probation.

Appellant, was indicted in a seven count indictment together with eight other defendants, to wit: Paymond Anderson, Joann Jones, Virgil White, Robert Moore, Bernard Johnson, Marx Jackson, Joe King and Edith Rivers. Only ARLETHA FRANKLIN, Appellant herein, and Virgil White, Joann Jones and Marx Jackson proceeded to trial. Johnson, Anderson and King are fugitives; Rivers pleaded guilty to the conspiracy count and the charges against Moore were dismissed just prior to trial.

ARLETHA FRANKLIN was named in Counts I (Conspiracy),
III (possession and distribution of one-eighth of a kilogram
of heroin) and VII (possession and distribution of two and
one-half ounces of heroin).

FACTS

Introduction

The government proceeded in this case on the theory that the named defendants together with the unindicted co-conspirators were engaged in a single conspiracy to distribute heroin and cocaine to various cities along the Eastern seaboard. In the government's presentation of the case the source of the narcotics involved was alleged to be defendant Raymond (Slim) Anderson. The principal couriers were Earl Rivers who was an unindicted co-conspirator and his common-law wife Edith Graves Rivers. Appellant, ARLETHA FRANKLIN, and Joann Jones were also alleged couriers and single trips were attributed to Edith Rivers' sister, Delzora Graves, and Robert Moore. The final distributees were alleged to be Robert (Bobby) Moore in Williamsport, Pennsylvania, Virgil White and Bernard Johnson in Atlanta, Georgia, and Marx (Moxie) Jackson in Washington, D. C. In spite of the government's attempt to prove a single conspiracy, as testimony was taken and the case evolved, which, taken in its most favorable light, showed a multiple conspiracy. There were

a series of incidents, unrelated to each other, involving the delivery of heroin and cocaine emanating from a number of sources to individuals who had no interest with each other. There was no knowledge of the business of the others and, in fact, even where there was alleged to have been a meeting, it was casual and unrelated to business. Appellant, ARLETHA FRANKLIN, even in the government's presentation of the case, did not know of the existence of Marx Jackson or the Washington, D. C. end of the alleged conspiracy. The only tie-up with Atlanta was an alleged call to Earl Rivers which did not disclose his "business" there. There was no single, mutual business venture, no common aim, and no "mutual dependence and assistance" between the various groups. The only real indication of a single business venture was the label placed on it by the government.

This Court is being asked to overturn the conviction of ARLETHA FRANKLIN because the government has again chosen to proceed by way of a format that this Court has many times branded as fundamentally unfair. US v. Sperling 505 F. 2d (1974); US v. Bertolotti 529 F. 2d 149 (1975); US v. Borelli 336 F. 2d 376 (1964). Because a conspiracy trial permits the use of hearsay testimony the defense of a conspiracy

trial is more difficult than any other type of trial. It is a format that is otherwise condemned in the Courts based upon British Common-law. In addition, it permits the use of uncorroborated testimony of informer-accomplices who often are, and were in this case, amoral, desperate individuals who have a profit motive to testify. This is a power that must be used with caution so that in an attempt to uphold our laws we do not destroy the foundations upon which the laws are founded.

The Background

Launey Earl Rivers was convicted of Possession of Counterfeit Bills in 1970 and received a sentence of three years in the Federal Prison at Lewisburg. Later, he was sent to the facility at Allenwood. At Allenwood, Rivers met one Raymond "Slim" Anderson. They became friendly and Rivers used to read and write for Anderson, who was illiterate (T-332). Two days before his release Slim gave Earl his telephone number and arranged to get together for a business relationship based upon trafficking in narcotic drugs.

"T" references refer to the Transcript.

Shortly after Earl Rivers was released from Allenwood, he received a call from Anderson, as the result of which he came to Anderson's restaurant in New York City and made a purchase of one quarter of a kilogram of heroin. At about the same point in time Rivers was approached by William Butler and Walter Burman about going into the drug business (T-625). For the balance of 1972 and well into the year 1973 Rivers dealt with Butler and Burman. Rivers also received drugs during the period of the alleged conspiracy from a number of other sources; that is one Mermie Jenkins of Baltimore; one Charlie Burman from Washington, D. C. (the brother of Walter Burman) (T-638); "Peewee" Hammond from New York (T-638); and also Philip Garretson and Bo Williams from New Jersey (T-638). There is nothing to indicate that any of these sources of heroin and cocaine knew of the existence of any of the others nor did they know any of the others. Also, they had no interest each with the other, financial or otherwise.

When Earl Rivers was released from Allenwood in 1972 he took up residence in Washington, D. C. but would occasionally visit his mother in Lakewood, New Jersey where he had been raised and where his mother still had a home.

He would leave sums of money with her from time to time when it suited his convenience. Before his arrest on the Counterfeiting charge he was engaged in the drug business in various parts of New Jersey which included Lakewood, Tom's River, Long Branch and Freehold (T-616). Early in 1973 Rivers met the defendant, Marx Jackson, socially. Jackson used to visit the sister of Joe King who was an old friend of Rivers. They had a slight social relationship which, by his own statement, was very casual (T-676)..

While living in Washington, D. C. Rivers met Edith Graves (Angel) while working in a cleaning store. They saw each other on a regular basis until Rivers moved to Williamsport, Pennsylvania in September, 1973. "Angel" visited him there and later moved there in about November, 1973, living with Earl Rivers as man and wife (common-law). In Williamsport, Rivers renewed an acquaintance with ARLETHA FRANKLIN.

Rivers had first met ARLETHA FRANKLIN in 1972 through her husband's cousin, Inez, who had met Rivers at Lewisburg while he was serving time for counterfeiting and Inez was visiting an inmate there.

Moore met Rivers at Lewisburg and Joann Jones was the girlfriend of one Billy Allen who had grown up with Rivers

in New Jersey. During the year that Rivers lived in Washington, D. C. from September of 1972 until he moved to Williamsport in September of 1973, he had only one narcotics transaction with Anderson, to wit: the purchase of one quarter of a kilogram of heroin. This was just after his release from Allenwood and Rivers paid Anderson \$5,000 and owed a balance of \$2,500 for this. Rivers still owed this money at the time he resumed drug dealings with Anderson in the Fall of 1973.

Although Rivers was dealing in narcotics and selling it in the Baltimore-Washington area as well as in New Jersey, none of those persons were mentioned as co-conspirators in this indictment.

Commercial Drug Dealings

Immediately following Rivers' move to Williamsport, Anderson called him there. Since he had not been in contact with Anderson since that isolated deal in 1972, he expressed surprise as to how Anderson had located him (T-339). He expressed chagrin because of his indebtedness to Anderson of \$2,500 dating from that 1972 deal. Anderson initiated a new and regular relationship with Rivers and soon Rivers and Angel

together, individually and/or with other individuals would drive to Anderson's restaurant, which was located between 118th and 119th Streets in Manhattan, to pick up heroin and sometimes cocaine and to bring it to Rivers' apartment in Williamsport (T-344). Rivers stashed same with Joann Jones (T-338) but later testimony indicated that ARLETHA FRANKLIN was used as a stash because Joann Jones allegedly was stealing drugs from Rivers. Testimony from Rivers indicated that ARLETHA FRANKLIN was paid \$350 per week for this service and later increased same to \$500 per week (T-346).

From November 1973 to March 1974 the Rivers made ten to twelve trips to New York for drugs (T-356).

The Meeting with White

About December of 1973 Rivers received a call from one Douglas Thomas who had grown up with him in New Jersey. At that point, Thomas was living in Baltimore and Rivers in Williamsport (T-496). Although Thomas was not dealing in drugs at the time he gave Rivers the telephone number of Virgil White in Atlanta, Georgia and told Rivers to call him. There is nothing in the record that would show any connection between Thomas and any of the other defendants nor is Thomas named as a defendant or an unindicted co-conspirator. Rivers

made two trips to White in Atlanta, Georgia purportedly with respect to his drug dealings. On his first trip Rivers was accompanied by Angei and a friend of his from Baltimore, one John Green, and Green's girlfriend, Pat. Green was not alleged to have had business dealings with Rivers and his purpose in going there was more social. Rivers travelled to New York, picked up one eighth of a kilogram of heroin from Anderson, and returned to Williamsport after going to Baltimore and Washington and dropping of some heroin with Mermie Jenkins to repay a past debt from Williamsport. The parties drove through the night to Atlanta, snorting cocaine all the night long. In Atlanta there was an alleged drug exchange between Rivers and Virgil White and his partner in the drug business.

It should be noted that, although Rivers alleged that ARLETHA FRANKLIN had called him while in Atlanta and asked that he send her more drugs and that he testified that John Green went back to Williamsport and returned to Atlanta while Earl and Edith Rivers were still there, there has never been any direct connection indicated in any way between ARLETHA FRANKLIN and Virgil White and Bernard Johnson other than an alleged meeting at a later date in Williamsport,

Pennsylvania. It is also significant to note that John Green never testified at this trial.

Rivers testified that after the drugs were sold in Atlanta on this first trip and White had paid him \$3,000 on account, he went back to Washington, D. C., leaving \$3,000 with his mother for safe-keeping and then spent \$1,300 and the rest of the night "having fun" (T-385). It should be noted that there has been no testimony that Anderson had any business connection with White, Johnson, Green or Green's girlfriend "Pat", nor that he had ever met them. It should also be noted that there has been no testimony up to this point that ARLETHA FRANKLIN had done anything more than accompany one or both of the Rivers' upon the Rivers' drug dealing trips to New York. There was nothing to indicate any business transactions at this point between ARLETHA FRANKLIN and Anderson.

Although Rivers had a regular business going with Anderson the fortunes of one did not depend on the fortunes of the other. Rivers had to pay Anderson or be obligated to pay him regardless of whether he was able to sell the narcotics for a good price or to even sell them at all. Anderson did not share in the profits that Rivers made nor did he suffer

if Rivers sustained losses. Although John Green had been an associate of Rivers for several months and had done some business with Rivers on prior occasions, he was not employed by Rivers.

Around January of 1974 the Rivers made a second trip to Atlanta. Again drugs were delivered to White and Johnson and then cut and packaged with the help of Edith and Earl Rivers, Bernard Johnson and Virgil White. Thereafter, Earl and Angel drove back to Washington, left some money with Earl's mother-in-law and went to an after-hours club where they met "Moxie", the defendant, Marx Jackson. Moxie stated that he didn't indulge but offered to sell it for Rivers. Jackson took some cocaine and disappeared for a period of time. Upon his return he stated that he could not sell it. Rivers noted that the cocaine had been tampered with but decided to accept his losses and not to make an issue of it. Although there was some testimony that Jackson had done some business with Anderson in the past, it should be noted that Rivers had met Jackson completely independently of his association with Anderson.

After the second trip to Atlanta, Rivers was unhappy with his business association with White and Johnson.

Rivers felt that he was exhausting himself chasing up and down the eastern seaboard with little or no profit for his efforts (T-412 & T-413).

Later testimony indicated that White and Johnson had stopped to see Rivers in Williamsport and although there was testimony as to a meeting with ARLETHA FRANKLIN, it was a "social meeting". White and Johnson accompanied Rivers to New York on this occasion but it would appear that they were present but had no business dealings. It should be noted that, prior to White and Johnson's trip to New York, Rivers had asked White to pick up some money from Jackson in Washington which Jackson owed Rivers. Jackson had never met either White or Johnson prior to this occasion and Jackson refused to give this money, which it appeared he owed Rivers for drug transactions, to White and Johnson. This so offended Johnson that he reached for a gun and almost ended up using same.

It should be noted that, at this point, ARLETHA FRANKLIN never had any direct narcotics dealings with Anderson and had never had any narcotics dealings with Jackson, White or Johnson. Although she knew and was a friend of Joann Jones, there had never been any narcotics dealings with Joann

Jones. ARLETHA FRANKLIN had never met Moxie Jackson. Although Robert Moore testified to a meeting with White and Johnson, a serious question was raised when he was unable to identify Virgil White at the trial (T-900-901).

Arletha Franklin and Rivers

The testimony is replete with many meetings between Appellant, ARLETHA FRANKLIN, and Earl Rivers, Angel and Bobby Moore. There is no question that ARLETHA FRANKLIN was a friend of Earl and Edith Rivers, Joann Jones and Bobby Moore. ARLETHA FRANKLIN had been introduced to Rivers earlier through her husband's cousin, Inez. She later was at the movies with her husband and Joann Jones and met Edith Rivers at that movie, who was there with Earl. There was much testimony that they socialized with each other, both Earl and Edith Rivers having cooked for MRS. FRANKLIN and her husband and MRS. FRANKLIN having cooked for both Rivers as well as Joann Jones. ARLETHA FRANKLIN had met Bobby Moore through Moore's brother, "Chuckie", who was a neighbor of hers and there was also a social relationship between Bobby Moore and Mr. & Mrs. Franklin. There was testimony that on one trip to New York on one of Rivers drug-buying expeditions,

he had borrowed the Franklin automobile. There was other testimony that, on a trip to Florida to see MRS. FRANKLIN's mother, she had borrowed the Rivers' car so that she and her husband could drive separate cars because there were so many children that they were taking on this trip to Florida. The testimony was that, in addition to the five children of Mr. and Mrs. Franklin, they had also taken some nieces and nephews on this trip and, hence, the two cars.

One of the incidents testified to in the trial was that of a trip in which Edith Graves' sister, Delzora Graves, went to New York with Angel, ARLETHA FRANKLIN and possibly one Pat Smith. Delzora Graves testified with respect to this trip and, although there was other evidence which indicated that the trip from Williamsport to New York was just under 200 miles each way, Delzora Graves had no recollection of the length of the trip, differed considerably with Edith with respect to details of the trip and, in fact, could not identify ARLETHA FRANKLIN (T-850). When asked to identify ARLETHA FRANKLIN in the courtroom, Delzora Graves selected a visitor in the rear of the courtroom.

The fact pattern was such that Moore and Earl and Edith Rivers were friends of ARLETHA FRANKLIN and her husband

as was Joann Jones, all social friends. However, if the meeting in fact took place with Delzora Graves, it was at most a very casual and transient relationship as was the possible meeting between ARLETHA FRANKLIN and Virgil White and Bernard Johnson. There was never any testimony as to a meeting between Moxie Jackson and ARLETHA FRANKLIN. So, the fact pattern that emerged from the trial testimony indicated very incidental drug transactions with people who may have known each other either casually or socially but at no point was there an indication that the defendants were involved in a common scheme or business association which would rise to the level of a conspiracy. To be sure, there were separate groupings in New York and in Atlanta and in Williamsport, Pennsylvania, and in Washington, D. C. and in Baltimore. Rivers even testified to the sale of narcotics in Florida on several occasions, but these groupings were not included in this indictment.

Taken in the most favorable light, these groupings were unrelated, one to the other, and by no stretch of the imagination could be raised to the level of a single conspiracy or business association.

The Arrest of Earl Rivers

Rivers was ultimately arrested in March of 1974 attempting to sell a spoonful of heroin to a Pennsylvania State Trooper. He was convicted after trial and received a sentence of 10 to 30 years. He was bailed out by Angel in April of 1974 and in June contacted the DEA authorities and began cooperating with the government. Later that year, and while still out on bail, he was arrested in the State of New Jersey for atrocious assault and robbery and that case was pending at the time he contacted the DEA authorities. The testimony indicated that, after the initial contact in June of 1974, Rivers did not again contact the DEA authorities until about October of 1975. During that time, the Pennsylvania conviction was reversed and the defendant was permitted to plead to a reduced charge. He received a sentence in New Jersey after pleading guilty but this sentence was to run concurrently to any sentence that he might receive in Pennsylvania. Just prior to trial, he had pleaded to the Pennsylvania charge and was awaiting sentence on said charge at the time of trial.

The Testimony of Sampson Williams

The government called one Sampson Williams as a witness against Moxie Jackson. Williams had known Jackson for some 15 years. After first asserting his rights against self-incrimination, Williams was granted immunity (T-945) and proceeded to testify. However, his testimony consisted of assertions that, with respect to all pertinent questions put to him, he was unable to remember. Despite strenuous objections by all of the defense counsel, Williams prior Grand Jury testimony was used to impeach him and was admitted as affirmative evidence. There was no question that the government had been aware that Williams would testify as he had in the courtroom and that this was known to the United States Attorney for at least two weeks prior to the trial (T-965-978). In fact, just before Williams was called to testify, defense counsel were handed memorandums of law on this very point which had obviously been prepared in advance.

The Grand Jury testimony that was introduced as evidence in chief tended to show that Rivers had met Williams in Washington, D. C. in 1972. It further indicated that Williams was a good friend of Moxie Jackson's and that he offered to introduce Williams to Anderson (T-987). Further

Grand Jury testimony indicated that Williams was never introduced to Slim by Rivers because Moxie wanted to keep this source for himself (T-989).

ARGUMENT

POINT I

THE GOVERNMENT'S PROOF SHOWED SEVERAL SEPARATE CONSPIRACIES RATHER THAN ONE. THIS VARIANCE PREJUDICED APPELANT, ARLETHA FRANKLIN.

The instant case falls within the traditional "hub-spoke" pictorial pattern described in the case of Kotteakos v. US 328 US 750 (1946). Although a narcotics trial, this case is controlled by the Kotteakos case rather than the more recent narcotics decisions in this Circuit, to wit: US v. Agueci 310 F. 2d 817 (1962); US v. Stromberg 268 F. 2d 256 (1959); US v. Tramunti 513 F. 2d 1087 (1975). In US v. Borelli (supra), Judge Friendly referred to the "hub-spoke" pictorial pattern described in Kotteakos:

"As applied to the long-term operation of an illegal business, the common pictorial distinction between 'chain' and 'spoke' conspiracies can obscure as much as it clarifies. The chain metaphor is indeed apt in that the links of a narcotics conspiracy are inextricably related to one another, from grower through exporter and importer, to wholesaler, middleman, and retailer, each depending for his own success on the performance of all the others. But this simple picture tends to obscure that the

links at either end are likely to consist of a number of persons who may have no reason to know that others are performing a role similar to theirs - in other words, the extreme links of a 'chain' conspiracy may have elements of the 'spoke' conspiracy." (Emphasis supplied)

A timely motion was made for a severance herein.

A searching examination and analysis of the groupings in case would clearly indicate that the people named in this indictment should have been tried separately, rather than together, and that Appellant's motion for a severance and her motion for a trial order of acquittal should have been granted. Appellant herein, ARLETHA FRANKLIN, had no conspiratorial design or agreement with any of the other defendants in this case. Although ARLETHA FRANKLIN was a close friend of Joann Jones, the trips attributed to Jones did not involve FRANKLIN and the trips attributed to FRANKLIN did not involve Jones. Certainly, FRANKLIN did not know any other defendants named in the indictment other than Edith Rivers. Even taking the prosecutor's case at its best, there had never been a meeting between FRANKLIN and Jackson prior to trial and possibly a meeting between FRANKLIN and White which appeared to be more of a social nature than a business transaction. Appellant FRANKLIN had no interest in the source

of the heroin. Up until the alleged trip to New York which was referred to in Count VII of the indictment, taken in the most favorable light to the prosecutor would indicate that FRANKLIN was not a direct purchaser nor had any direct business relationship with Anderson. Nothing in the evidence adduced at the trial would indicate that FRANKLIN had any idea of the scope of Earl Rivers' narcotics business interests. If Anderson were arrested and unable to supply narcotic drugs to Earl Rivers, this would make no difference to ARLETHA FRANKLIN so long as Rivers continued to supply drugs to her. There was no mutual aid or assistance between the groups, no pooling of funds and no common aim or goal. If Moxie Jackson, Joe King, Bernard Johnson and Virgil White were removed from the scene, this would in no way affect the interests of FRANKLIN. Unlike the usual narcotics conspiracy where the drugs are supplied from a single source, Anderson was not either the only or principal source of the drugs. "Peewee" Hammond, Mermie Jenkins, Philip Garretson and Butler and Burman, as well as Bo Williams, also supplied drugs to Earl Williams.

If FRANKLIN was indeed involved as alleged herein, it mattered not to her what happened to Anderson or where

Rivers obtained the drugs. It should be mentioned that some of the participants in this series of conspiracies exhibited behavior that would have been very harmful were this a single conspiracy. It was mentioned herein (T-402) that Rivers had believed that Jackson had stolen some cocaine from him at the time he attempted to dispose of it for Rivers. Again, on one occasion, while returning to Williamsport from New York after purchasing drugs from Anderson, Rivers claimed that he took over the wheel from Joann Jones who was driving because he believed that she was stealing drugs from under the dashboard in the car while he was sleeping in the back seat. It is not alleged that these rather minor thefts could be considered of a magnitude of the "rip-offs" as cited in US v. Bertolotti 529 F. 2d 149 (1975). However, both in Bertolotti and in the within case, this type of conduct when examined qualitatively rather than quantitatively would belie the existence of a single conspiracy.

It should be noted that the "actors" showed how they felt and what parts they played in the scheme of things so that, in spite of the advance notice from Rivers, Jackson refused to treat Johnson and White as part of "his organization" and refused to recognize the existence of any

organization by his refusal to deliver money to Johnson and White to carry to New York for Anderson. This would tend to show a denial of the existence of any over-all organization.

In T-700, Earl Rivers clearly stated that he did not work for Anderson. "Moxie" refused to share "his source of supply" with co-conspirator Sampson Williams. This again would tend to show that a single over-all conspiracy did not, in truth, exist.

One must admit that there was some connection between the parties, namely that they were in the same business, to wit: trafficking in narcotic drugs. Trying the various alleged co-conspirators herein made no more sense than would the prosecution of all drug dealers within a geographical area, such as Harlem or Newark, in a single conspiracy.

In US v. Bertolotti (supra) the court held "The only common factor linking the transactions was Rossi and Coroallizo". Here, the only factor linking ARLETHA FRANKLIN to White and Johnson in Atlanta, Georgia, and to Moxie Jackson and Sampson Williams in Washington, D.C., and to the Baltimore people, was Rivers. If one were to remove Earl Rivers, one would be left with a number of individual dealers

in narcotic drugs who had their own customers, their own sources and their own underlings.

This court set forth a test of mutual "dependence and assistance" between various groupings in US v. Aqueci (supra), or a "common aim or purpose among the participants" in US v. Tramunti (supra), or that "each participant knew of his or her role in a larger organization" in US v. Sperling 505 F. 2d 1323 (1974), and these tests have not been met in the within case.

Appellant is cognizant of the decision of this court in the recent case of US v. Sarmiento (supra) and of the extremely complex and sophisticated nature of the organization. It should be noted, however, that in said case there was the sophistication of frequent coded telephone conversations between the many parties which could bind a group and belie a multiple conspiracy finding. In this case there was no such sophistication. The contacts were direct and simple and based upon social intercourse between Rivers, Angel and Joann Jones, Bobby Moore and Appellant, in the Williamsport group. Rivers' contacts with White and Johnson in Atlanta were clearly unrelated to anything that transpired in Williamsport, Pennsylvania.

It is apparent that Earl Rivers' drug business during 1972 and 1973 in the Baltimore/Washington area constituted a distinct and separate conspiracy. These dealings involve a source different from the one named in the indictment, different parties were involved who had interests substantially unlike those in Williamsport, Atlanta and Florida. The dealings that Rivers had with Johnson and White in Atlanta were clearly a distinct and separate conspiracy as were the dealings that he was alleged to have had with the Williamsport, Pennsylvania, group.

Another question that should be considered was the prejudice suffered by Appellant by joining the participants in the different and separate conspiracies into a single trial.

Rather than burden this court with another repetition of authorities which have already been included in the brief of Jerome A. Landau, Esquire, attorney for Appellant, Virgil White, pursuant to Rule 28(i) which provides "in cases involving more than one Appellant or Appellee including cases consolidated for the purpose of appeal, any number of either may join in a single brief and any Appellant may adopt by reference any part of the brief by another"; Appellant

refers this court to the authorities on this issue referred to in said brief, and particularly the quotations from Bertolotti (supra) quoted from Kotteakos.

Although FRANKLIN'S counsel joined in this research, Appellant FRANKLIN does not necessarily join in White's analysis of the conduct of the alleged co-conspirators.

Appellant FRANKLIN was seriously affected by joining her case to that of the Washington, D. C. group. The relating of Rivers spending \$1,300 in one evening's "funning" must have had a serious effect upon the view of ARLETHA FRANKLIN. Again, referring to Rivers, Angel, Pat and John Green snorting cocaine while driving to Atlanta for a rendezvous with Johnson and White must have had a crushing effect on ARLETHA FRANKLIN. Again, by joining the case of Appellant ARLETHA FRANKLIN with Moxie Jackson, showing the sordidness of life in the after-hours clubs in Washington, D.C. and later the fiasco and having his "non-testimony" with the inferences that he was "talked to" and/or "threatened". This had a devastating effect upon Appellant.

POINT II

THE DISTRICT COURT ERRED IN ALLOWING
THE GRAND JURY TESTIMONY OF SAMPSON
WILLIAMS AS AFFIRMATIVE PROOF AND THIS
CREATED AN ATMOSPHERE DETRIMENTAL TO
APPELLANT.

The Sampson Williams affair was indeed a fiasco. Sampson Williams was brought into the courtroom to testify to an alleged conversation with defendant Jackson. His testimony had no direct bearing on any of the activities of Appellant FRANKLIN. After first refusing to testify, claiming his constitutional rights, the trial court gave Williams immunity. His testimony then consisted of statements such as "I don't remember." or "I don't recall." Williams, in fact, testified to nothing. He neither affirmed nor recanted his prior testimony before the Grand Jury. The prosecutor indicated, out of the presence of the jury, that he had been aware that Williams would testify in this manner for a period of at least two weeks. In addition, just before Williams took the stand, defense counsel were handed memorandums of law in this regard. After Williams testified in this manner the prosecutor proceeded to introduce into evidence Williams' prior Grand Jury testimony as affirmative evidence. A very

detailed and exhaustive brief is being prepared by John Shorter, Esquire, attorney for Appellant Jackson, in this regard and, accordingly, Appellant FRANKLIN, pursuant to Rule 28(i) of this court, will adopt by reference Mr. Shorter's arguments and authorities that he has cited, rather than to repeat said arguments in this brief.

However, Appellant FRANKLIN would like to point out to this court that Williams' testimony was absolutely devastating in that an atmosphere was created in the courtroom which indicated that between the times of his original testimony before the Grand Jury and his subsequent "testimony" at the trial of this matter, he had been "talked to" and possibly "threatened". Obviously, Williams could not be cross-examined in the Grand Jury. At the trial of this action, he did not recant his Grand Jury testimony but merely did not recall same; so that, although there was a opportunity to cross-examine Williams at the trial, he could be cross-examined only as to absolutely nothing.

The cases cited in the brief of John Shorter, Esquire, counsel for Appellant Jackson, will indicate in more detail this distinction. By getting this Grand Jury testimony in "through the back door" the prosecutor was able to completely

destroy trial counsel's right to effectively cross-examine this witness. Because of the atmosphere created during this fiasco, which inferred that Williams had been "spoken to" and/or "threatened", and in spite of the fact that Williams' prior Grand Jury testimony had implicated only Jackson, the trial and the fortunes of Appellant FRANKLIN went steadily downhill from that point until the very end of the trial.

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, Appellant ARLETHA FRANKLIN incorporates by reference the arguments and authorities cited by John Shorter, Esquire, in his brief on behalf of Appellant Jackson.

POINT III

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE DIFFERENCE BETWEEN A SINGLE CONSPIRACY AND A MULTIPLE CONSPIRACY.

There is a tendency for most jurors to convict a defendant believed to be involved in the sale or purchase of narcotic drugs regardless of a mere technicality. Under these circumstances, it is incumbent upon the District Court Judge to give the jury special guidance so that they can properly and intelligently come to a decision as to whether there was a single or multiple conspiracy. In his charge, the District Court failed to give the necessary guidance (see Appendix pages A-19 through A-34).

Again, the brief of Jerome A. Landau, Esquire, discusses the authorities in great detail and Appellant FRANKLIN incorporates his authorities cited and arguments by reference herein pursuant to Rule 28(i), (supra).

Without any sort of instruction as to the distinction between single and multiple conspiracies an essential element which must be passed on by the trial jury was missing; and without such a foundation their verdict should be reversed.

CONCLUSION

THE CONVICTION OF APPELLANT
ARLETHA FRANKLIN SHOULD BE
REVERSED AND THE INDICTMENT
DISMISSED.

Respectfully submitted,

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